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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 797

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF THE PETITIONER

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Questions Presented

The Court of Claims held that the Government took the property subject to the petitioner's liens sustained by an existing valid judgment of the New York Supreme Court not unconstitutionally without any compensation but lawfully because of alleged rules of international law. The petition herein was devoted to the proof that the Court of Claims misunderstood the decisions of this Court on the rules of international law involved and failed to apply this Court's pertinent decisions. In response the Government said:

> "Petitioner's contention that her property was unconstitutionally taken without compensation is fully answered by the court below" (p. 12).

*Italics are ours, unless otherwise indicated.

We submit, that no one may desire a clearer admission of inability to answer on the merits the contentions showing the errors of the court below stated in the petition herein.

The "Question Presented" in the Government's brief does not exist in this case (see *infra*, at pp. 3-6). The questions that are presented are as follows:

1. Did Roosevelt-Litvinov Assignment of November 16, 1933 nullify judgment *in rem* and judicial liens granted by New York Supreme Court to James A. Tillman, an American citizen, against the funds of Russo-Asiatic Bank, a Russian corporation, held in New York State by New York banks?

A converse of this international law proposition dealing with confiscated property in the territory of the confiscating state was recently reviewed by this Court by a writ of certiorari in *Banco Nacional de Cuba* v. *Peter L. F. Sabbatino, etc., et al.*, No. 16, October Term, 1963, decided on March 23, 1964. This Court never construed the exception relating to American judgments in the Litvinov Assignment. Writs of certiorari are usually granted by this Court, when international treaties of the United States never passed upon by this Court are involved. Compare: *Kolovrat* v. *Oregon*, 366 U. S. 187, 191.

2. Did the Treasury Department's taking of the New York funds of the Russo-Asiatic Bank burdened with attachment and judgment liens granted to James A. Tillman, an American citizen, by the New York Supreme Court and the distribution of such funds to private citizens with claims against Soviet Government, constitute violation of full faith and credit clause in Article IV of the United States Constitution and a confiscation of Tillman's property without just compensation in violation of Fifth Amendment thereto?

Writ allowed in cases involving similar questions of constitutional violations. Compare: *Braen* v. *Pfeifer Oil*

Transportation Co., Inc., 361 U. S. 129, 130; *Upshaw* v. *United States*, 335 U. S. 410, 412, and *United States* v. *Butler*, 297 U. S. 1, 61.

The Jurisdiction of the Court Below Is Neither Governed Nor Affected by Government's Defense Based on the Refusal of the Foreign Claims Settlement Commission to Consider Merits of Petitioner's Claim

The Government claims in its brief that the court below has no jurisdiction of this action "since in effect it sought to review a decision of the Foreign Claims Settlement Commission denying petitioner's claim * * *" (at p. 2).

The Court of Claims in its opinion differed from the Government in defining the nature of petitioner's action:

> "In her petition plaintiff has alleged that the United States, acting in accordance with an Act of Congress, which plaintiff alleges is unconstitutional, has taken her property in violation of the Fifth Amendment to the Constitution, for which she is seeking a judgment against the United States in the amount of $200,675.05 with interest" (App. at pp. 40-41).

It is true that the Government in its answer relied on section 314 of the International Claims Settlement Act of 1949 (64 Stat. 12) as amended 1955 (69 Stat. 562) set forth on page 3 of its brief. The jurisdiction of any court does not depend on the defenses, but solely on the substance of the demand as stated in the petition. Said this Court in *Louisville & Nashville R. R. Co.* v. *Mottley*, 211 U. S. 149 at page 152:

> "* * * a suit arises under the Constitution and laws of the United States *only when the plaintiff's statement of his own cause of action shows* that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to

his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States."

Accord:

Gignon v. *Astor*, 2 How. 319, 337;
United States v. *Arredondo*, 2 Pet. 689, 709.

Moreover, there is nothing to review in the acts of the Foreign Claims Settlement Commission regarding petitioner's claim as the Commission never considered its merits. As the Government says in its brief "on October 9, 1956, the Commission issued an order which stated that unless petitioner, within ten days, sustained her burden of proving that her claim originally arose in favor of an American national, the Commission would affirm its proposed decision" (p. 9) of dismissal. The petitioner filed no such proof, and her claim was dismissed for lack of proof, and not on the merits.

Petitioner filed her claim with said Commission solely to protect herself against a possible defense that she went to court before exhausting her administrative remedies. (*Civil Aeronautics Board* v. *Delta Air Lines*, 367 U. S. 316, 321; *Boynton* v. *Blaine*, 139 U. S. 306, 325-6; *Bustos-Osalle* v. *Landon*, 235 Fed. (2) 878, 880.)

Petitioner never filed a claim with the Commission within the terms of the International Claims Act. She demanded full faith and credit to her New York judgment, refused to split it up into the original claims as contrary to Article IV of the Constitution and demanded compensation for the taking of the property subject to her liens under Fifth Amendment thereto. The Commission requested that petitioner file claim within its jurisdiction, and the petitioner refused. The only thing to review, if anything, is the petitioner's refusal, and that is not reviewable. Petitioner is satisfied with the action of the Commission, and Government's claim that she impliedly seeks to review Commis-

sion's failure to consider her claims on the merits is illogical and baseless.

The Government moved in the United States District Court for the District of Columbia to dismiss petitioner's complaint on the ground that "Congress has provided a remedy at law for the taking of private property (28 U. S. C. 1491)" (Petition at p. 12). That is the section conferring jurisdiction on the United States Court of Claims. Having obtained the dismissal of said petitioner's complaint on the ground that the petitioner's claim is within the jurisdiction of the Court of Claims, the Government is now estopped to claim, as it does in its brief, that said Court has no such jurisdiction (see cases in the petition, par. 12 at p. 12).

Refusal of an administrative agency to consider a claim on the merits does not preclude its enforcement through the courts. (*United States* v. *San Francisco*, 310 U. S. 16, 31-2; *Federal Communication Comm.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143; *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 Fed. (2) 51, 54-5.)

While petitioner does not seek any review of any decision of the Commission in this action, the vigorous contention of the Government (its brief at pp. 10-12) that Congress may pass law forbidding recourse to the courts for redress against constitutional violations by the Government or its agencies is contrary to settled law (see quotations from *Estep* v. *United States*, 327 U. S. 114; *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38; *United States* v. *Butler*, 297 U. S. 1 on pages 29 and 30 of the petition).

The Government cited for the support of its position *De Vegvar* v. *Gilliland*, 228 Fed. (2) 640, where the Court of Appeals for the District of Columbia expressly held that section 314 of the International Claims Settlement Act does not preclude recourse to the courts in cases involving violations of constitutional rights (see quotation in

the petition at pp. 30 and 31). This Court refused to review the said decision in 350 U. S. 994, and, therefore, impliedly held it to be correct. Petitioner's case is precisely within the language and intent of the said ruling by said Court of Appeals.

Section 314 of the Claims Settlement Act (App. p. 52), on which the Government relies, makes "The action of the Commission in allowing or denying any claim * * * final and conclusive on all questions of law and fact". What questions of law and fact the Commission considered on petitioner's claim. Merely, refusal of the petitioner to base her claim on the original causes of action underlying her judgment and the nationality of original owners of said causes of action.

Is the petitioner in this action in the Court of Claims standing on her New York judgment or on the original causes of action underlying said judgment? Is the petitioner seeking in this action a mandamus to compel the Commission to consider her claim on the merits, or to vacate its order of dismissal? Did the petitioner ask the Court of Claims to review "any question of law and fact" involved in the order of dismissal of the Commission? Since the answer to all these questions is in the negative, the decision of the Court of Claims that the petitioner is barred to prosecute this action in said Court by the provisions of said section 314 is clearly erroneous.

Petitioner's Present Judgment Superseded All Prior Rulings by Federal and State Courts Cited by the Government

The Government in its brief does not question the validity of the petitioner's present judgment and of the liens granted and sustained by it. While technically it is a default judgment, the order authorizing it was made against a vigorous opposition by Evarts, Choate, Sherman & Leon, attorneys for the Russo-Asiatic Bank. The judgment under

New York law was entered after proof of plaintiff's claims satisfied the New York Supreme Court that such claims were valid (see petition at pp. 5 and 6). In any case, even as a default judgment, it is fully protected by the Full Faith and Credit Clause of the Constitution (Article IV). (*Morris* v. *Jones*, 329 U. S. 545; *Treinies* v. *Sunshine Mining Corp.*, 308 U. S. 66; *Riehl* v. *Margolies*, 279 U. S. 218.)

On pages 6 and 7 of its brief the Government cites *Tillman* v. *Russo-Asiatic Bank*, 51 Fed. (2) 1023, cert. den. 285 U. S. 539, and *Tillman* v. *Russo-Asiatic Bank*, 240 App. Div. 710, 264 N. Y. Supp. 714, affirmed 264 N. Y. 467; 191 N. E. 495, but fails to inform the Court that these decisions became nullities, when the New York Court of Appeals held that they were procured by unauthorized attorneys for the bank (see petition, par. 5 at p. 6).

The note on page 6 in the Government's brief again asserted and repeated in another note on page 8 "that prior to the default judgment of 1935, federal and state courts, ruling on the merits, had denied recovery to Tillman".

While Tillman's action was pending in the United States District Court for the Eastern District of New York, jury gave verdict for the plaintiff for $172,566.60 on the third cause of action which was for *a dollar* draft, and the District Judge denied the motion of the defendant to set it aside. Furthermore, New York Supreme Court in the receivership action of Russo-Asiatic Bank awarded *and paid* to the petitioner in 1953 $10,000.00 on account of her attachment lien, because it held her judgment and her lien valid (see petition, pars. 4 and 6 at pp. 5, 6 and 7).

The dictum as to status of Tillman's attachment in *Steingut* v. *Guaranty Trust Co.*, 58 Fed. Supp. 623, relied on by the Government in note on page 8 of its brief is worthless. In said case, the District Court said:

> "On December 29, 1939, Tillman filed a claim with the receivers founded on the same judgment (Septem-

ber 23, 1935). Had the receivers prevailed in their action, Tillman could not have judgment in this action but would be relegated to his claim in receivership. Civil Practice Act, Sec. 977(16); *Walling* v. *Miller*, 108 N. Y. 173. The receivers having failed, the question whether the filing of his claim with the receivers constitutes a waiver of his claim in this court, is not presented. * * * It follows that *in the equity action* the complaints of the receivers and intervenors Tillman and Millard are to be dismissed; * * *" (at pp. 623, 642-3).

These were the only issues presented by the pleadings. The District Court never intimated that he was interested in the validity of Tillman's attachment. Tillman submitted no evidence in connection therewith, nor applicable New York law, which is very technical and requires expert knowledge. As the District Court's dicta indicate, they were based on erroneous facts and complete disregard of the applicable state law. The District Court ignored the fact that the federal Court's order vacating the attachment was procured by the fraud of unauthorized attorneys for Russo-Asiatic Bank. The District Court did not know that there were other attachments in force on November 16, 1933, on Russo-Asiatic funds with the Guaranty Trust Company which under New York law enured to Tillman's benefit. Surely, the plaintiff is entitled to prove these facts to show the invalidity of the District Court's dicta.

When all the parties read these dicta they considered them so groundless that they decided to disregard them. The receivers (Steingut and Blodgett) paid petitioner in 1953 $10,000 as they knew she had a valid attachment, that being the proportionate part of the Russo-Asiatic funds held by them due on her attachment (see petition, pp. 6 and 7).

The Guaranty Trust Company on the appeal in *United States* v. *Guaranty Trust Company* (161 Fed. (2) 571,

cert. den. 332 U. S. 807), contended that sums attached should be deducted from the recovery of the United States, *and listed among the valid attachments then in force that of Tillman.* The Government answered that such claim should have been set up as defense, and cannot be raised for the first time on the appeal. The Circuit Court of Appeals agreed with the Government.

Government cannot rely on dicta in *Steingut* case, as it was not a party in it. The District Court tried together two entirely separate cases which the Government refused to consolidate, so that they remained separate and distinct to this day. One, *Steingut & ano.* v. *Guaranty Trust Co.*, an equity case, and two, *United States* v. *Guaranty Trust Co.*, a law case, based on the Soviet assignment. Tillman filed interpleader only in the *Steingut* case, and never appeared in the *Government's* case. *United States* never appeared in the *Steingut* case. Therefore, under the rule in *United States* v. *Pink*, 315 U. S. 203, 216, said dicta are not helping the Government now against petitioner. Petitioner is entitled to present true facts in this action against the Government regarding the validity of her attachment, despite the dicta of the District Court in the *Steingut* case (see petition at pp. 6, 7, 22, 23, 24).

The District Court in the *Steingut* case, had no jurisdiction to consider the merits of Tillman's attachment lien judgment. Tillman's intervention in the *Steingut* action was based on his state judgment giving him an attachment lien. In directing this judgment, the New York Supreme Court, in the order of July 13, 1935, said:

> "And it appearing to the satisfaction of the Court * * * that a warrant of attachment was duly granted in the above entitled action, and had been duly levied on the property of the defendant Russo-Asiatic Bank, consisting of indebtedness due to it from The National City Bank and Guaranty Trust Company of New

> York, domestic banking corporations, and that the description of the property of the defendant Russo-Asiatic Bank so attached and the value thereof are duly set forth in the foregoing proof and the affidavits submitted to the Court, *and that due and sufficient proof of the causes of action set forth in the complaint was made before the Court* • • •
>
> ORDERED that the Clerk of the County of Queens be and he hereby is directed to enter a judgment by default in favor of the plaintiff James A. Tillman against the defendant Russo-Asiatic Bank in the sum of $210,497.20 • • •."

Under the Full Faith and Credit clause of the Constitution (Art. IV), even if the District Court disagreed with the New York Supreme Court on the facts and on the law, it was without jurisdiction to review state decision and to intimate that Tillman had no valid attachment. (*Titus* v. *Wallick*, 306 U. S. 282; *Cooper* v. *Reynolds*, 10 Wall. 308; *Fox* v. *McGrath*, 152 Fed. (2) 616.) Even a decision on the merits on a point outside of the court's jurisdiction is not binding. So, there is no basis for Government's vicious note. The matter was argued in the Court of Claims, and it ignored in its opinion Government's reference to said dicta.

The Government on page 7 of its brief summarized the conclusions of Tillman against Russo-Asiatic Bank litigation in the federal and state courts:

> "On July 13, 1935, after the New York Court of Appeals rendered its decision in Issaia v. Russo-Asiatic Bank, et al., 266 N. Y. 37, 193 N. E. 543 (holding the appearance of Evarts, Choate, Sherman & Leon as attorneys for the Russo-Asiatic Bank unauthorized and the decisions so obtained by them void), the state court entered an order setting aside these (prior) judgments and orders, and also, (reversing)

nunc pro tunc as of November 26, 1927, the former order of the state court vacating the August 22, 1927 attachment as of June 26, 1928. On September 23, 1935 the state court entered the default judgment for $210,675.05 * * *."

That being the fact, is it fair and proper to attempt to influence or to prejudice this court by referring to decisions set aside and annulled by the state court prior to the direction and approval of the judgment herein involved, still standing valid and entitled under the Constitution to full enforcement in the federal courts? There is no claim of fraud in its procurance or of lack of jurisdiction in the New York State court.

Both in 1927 and in 1935 the funds of the Russo-Asiatic Bank were located in New York City. Petitioner's execution of 1935 was "but continuance of the attachment" of 1927. (*Thatcher* v. *Bancroft*, 15 Abb. Pr. (N. Y.) 243.) Her warrant of attachment of 1927 was not affected by the intermediate orders vacating or reinstating the said warrant. (*Pach* v. *Gilbert*, 124 N. Y. 612, affirming 9 N. Y. Supp. 548 and 7 N. Y. Supp. 336; *Helman* v. *Brenner*, 2 How. (N. Y.) 354, 357 (and see petition at p. 23). Clearly, the United States Court of Claims has erroneously declined jurisdiction based on unconstitutional disregard of New York State judgment, and on the unconstitutional taking without compensation of the funds of Russo-Asiatic Bank attached under said judgment and expressly exempted from the operation of Roosevelt-Litvinov Assignment from the application to the payment of private claims against Soviet Government.

CONCLUSION

That the United States Court of Claims has jurisdiction of petitioner's claim based on a valid judgment of New York Supreme Court granting her valid liens against the funds of the Russo-Asiatic Bank in New York City, and on the taking without any compensation of said funds by the Treasury Department to pay private claims of other citizens, against the Soviet Government and that a writ of certiorari should be granted to review the decision of said Court to the contrary.

Respectfully submitted,

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New York, N. Y., April 3, 1964.